No. 3772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. B. CASSERLY,

Plaintiff in Error,

vs.

REY B. WHEELER,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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I.

STATEMENT OF THE CASE.

The plaintiff in error prosecutes a writ of error to the District Court of the Northern District of California to reverse the judgment of that Court awarding the defendant in error $750.00 as damages for alleged false imprisonment. The defendant in error, Rey B. Wheeler, on September 11, 1919, filed a complaint against the plaintiff in error Casserly in the Superior Court of the City and County of San Francisco, claiming damages against him for false imprisonment. Thereafter the cause was removed to the District Court of the United States

in and for the Northern District of California. A trial was had therein before the court and a jury and at the close of the trial the Court gave to the jury an instruction for a verdict in favor of plaintiff, submitting to the jury nothing but the single question of the amount of damages. Such a verdict was returned, judgment was entered thereon and the defendant in the action prosecutes his writ of error to reverse the judgment, claiming that the Court erred in so instructing a verdict.

Considering, as we may, not only the admitted facts of the case, but the facts as to which there was sufficient testimony for the jury to take the defendant's claim, the transaction was as follows:

On and prior to September 18, 1918, the defendant John B. Casserly was a member of the Local Board No. 1, of the City and County of San Francisco, California, acting under the Selective Service Act. The headquarters of the Board were at the Hotel Whitcomb at San Francisco. At the times in question the defendant was on that day in charge of the office of the Board, his two co-members being absent. On the same date the plaintiff Rey B. Wheeler was a registrant under the Selective Service Act; he had previously registered thereunder with the Local Board at Seattle and had filed the prescribed questionnaire and had been given a deferred classification as a mariner, having been classified by the Seattle Board under Divison B, Class IV, as a mariner actually employed in sea

service of a citizen or merchant of the United States. The plaintiff thereafter removed to San Francisco and was employed therefrom as a mariner. On September 18, following the usual custom in that behalf, he went before San Francisco Local Board No. 1 and saw the defendant, with a view of obtaining the necessary passport to enable him to go to sea. The defendant gave him the telegram of the San Francisco Board to the Seattle Board, recommending the granting of the necessary passport, and plaintiff thereupon took the telegram to the office of the Western Union Telegraph Company at the Powell and Market Street station, and caused it to be sent to Seattle. He had arranged to return to the San Francisco Board later in the day to obtain the answer from Seattle and the necessary passport. One of the clerks at the telegraph station, one Gertrude R. Smith, noted the character of the dispatch and fully believed that she recognized the plaintiff Wheeler as another person, of the name Nolan, who was for some reason a fugitive, and believing that plaintiff was sending a telegram under a name that did not belong to him and was seeking to obtain a passport under false pretenses and that he was thereby violating the Selective Service Act, she imparted her suspicions to her superiors in the office and by their direction she communicated with the office of Mr. Blanford, the chief of the local representatives of the Bureau of Investigation of the Department of Justice. Thereupon Mr. H.

H. Dolly, one of the special agents of the United States attached to the Bureau, went to the telegraph station and interviewed Miss Smith as to the information, and believing her complaint well founded, Mr. Dolly telephoned to the defendant at the Local Board headquarters and told Mr. Casserly that he had reason to believe that a man giving the name of Rey B. Wheeler would call at his office either that day or the following day and that in case he should call, to hold him, and that according to Mr. Dolly's best recollection, he then communicated to Mr. Casserly the circumstancees as he understood them. Tr. P. 65 Some time after five o'clock Wheeler went a second time to the office of the draft board. The usual police officer detailed in attendance at the Board room had gone home. There was no one else present at the draft room except the clerks and Mr. Casserly; the other two members were absent. It was too late to communicate with Blanford's office, it being after five o'clock. Thereupon the defendant telephoned to the Southern Police Station requesting that a police officer be sent to the office of the draft board. In a short time the plaintiff desired to depart and he was detained by the defendant. Soon thereafter two policemen appeared and took the plaintiff in custody. He was taken to the San Francisco jail and booked as en route to the United States Marshal. The following morning he was taken out by one of the representatives of the United States Bureau of Investigation and questioned at length, when the special agents became

convinced that an error had been made and released him. He then went before the defendant's Board and obtained the seaman's passport which he had sought, and departed. He commenced this action a few days less than one year thereafter. The defendant's entire action in the premises was with the utmost good faith.

II.

SPECIFICATION OF ERRORS RELIED UPON

The plaintiff in error relies upon the following errors of the court specified by him in his assignments of error filed herein, towit:

1. "That the Court erred in instructing the jury that their verdict must be for the plaintiff in the following language:
   " 'I must, therefore, advise you that whatever may have been the defendant's intent, he was not justified in arresting the plaintiff or turning him over to the police officers. Your verdict, therefore, must be for the plaintiff in some amount, and the only question is how much. That question is submitted for your consideration and judgment, to be answered by you in the light of all the circumstances in evidence.' "

2. "That the Court erred in instructing the jury in the following language.
   " 'Under the undisputed testimony in this case, I advise you that the defendant did in effect arrest the plaintiff and cause him to be delivered to the police officers of the city. He was directly instrumental in hav-

ing the plaintiff imprisoned, and unless such arrest and imprisonment were justifiable, he must be held to be responsible for such injury and detriment to the plaintiff as were the natural consequences of his acts in that respect.' "

3. That the Court erred in instructing the jury in the following language:
" 'I further advise you that the facts shown in defense or explanation of the imprisonment of the plaintiff are insufficient, in law to warrant you in finding that it was justifiable.' "

4. "That the Court erred in instructing the jury in the following language:
" 'Here, admittedly, the plaintiff had neither done nor attempted to do any wrong. He was chargeable with no unusual or suspicious conduct. If the testimony of the witnesses for the defense is to be believed, it was his misfortune to bear some resemblance to another young man, who, however, so far as the evidence shows, had neither done nor attempted to do any wrong.' "

5. "That the Court erred in instructing the jury in the following language:
" 'And he was arrested without warrant and put in jail without being informed of the the charge against him or being taken before a magistrate, or given an opportunity to explain the charge, or to furnish bail. There are the conceded facts.' "

6. "That the Court erred in instructing the jury in the following language:

"'Clearly, the arrest could not be justified upon that ground. Neither could it be justified, if we were to disregard the defendant's testimony and assume that he acted as deputy sheriff, and not merely as a member of the draft board.''

7. "That the Court erred in instructing the jury in the following language:

"'You will note that if he had been acting independently as a deputy sheriff, the means were apparently at hand by which the mistake could have been avoided. The plaintiff apparently lived here in San Francisco, or in the vicinity, and had upon his person certain means of identification, and could, if he saw fit so to do, have given the defendant, if the latter had been willing to make an investigation, information which would have enabled him, without delay, to have determined that plaintiff was not attempting to commit a crime.'"

8. "That the Court erred in taking away from the jury the determination of questions of fact."

9. "That the Court erred in refusing to give the following instruction:

"'If you find that the plaintiff, Rey B Wheeler, was restrained in his liberty by J. B. Casserly, but that such restraint was by J. B. Casserly while acting as a regularly appointed member of Draft Board No. 1 of the City and County of San Francisco, and while regularly appointed Deputy Sheriff

of said City and County, and that said J. B. Casserly, when said plaintiff, Rey B. Wheeler, was so detained, had reason to believe that said plaintiff was in the act of committing a crime, to wit, was attempting to evade the Selective Service Draft, for military service in the United States Army, and that the length of time that said plaintiff was detained was such as would be considered reasonable under the circumstances to ascertain whether or not such crime was being committed, then I instruct you that said detention was warranted, and you must find for the defendant.'' '

10. ''That the Court erred in sustaining the plaintiff's objection to the following testimony:

'' 'Mr. Leonard.—Q. Now, Mr. Dolly, with reference to matters at that time, was this the ordinary and customary procedure in such cases?

'' 'Mr. Devoto.—I think we will have to make the special objection. I object to that question on the ground it is immaterial, irrelevant and incompetent and not binding on the plaintiff.

'' 'The Court.—Sustained.

Mr. Leonard.—Exception.' ''

In a word, the plaintiff in error complains that the court, by the specified instructions given by it as well as by its refusal to give the instructions

proposed by the defendant, gave to the jury an instruction on the whole case imperatively requiring them to return some verdict for the plaintiff, leaving for their consideration solely the amount of the recovery. It is thus seen that the ruling of the court complained of, was fundamental and given in favor of plaintiff after due consideration, taking the plaintiffs view of the controversy and refusing to take the defendant's view or to concede that any of the matters urged by him was any defense to the action. This ruling was stated in different forms in the different paragraphs of the instructions; but in sum, the ultimate holding of the court was that neither the official status of the defendant nor any of the matters or provisions contained in the Selective Service Act or regulations issued thereunder constitute any defense to plaintiff's action. We shall urge that the view of the court so announced, controlling the outcome of the whole case, was not in accordance with the law that governed the situation.

III.

ARGUMENT.

The case is governed by the "Selective Service Act"; the general law respecting arrest has little, if any, bearing.

The plaintiff has proceeded upon the theory that the case is the ordinary one arising under the law of the State of California and governed by the

California law respecting arrests. He brought his action in the State Court framing his complaint according to the ordinary forms to obtain damages for false imprisonment, claiming that the right of the plaintiff and the obligations and duties resting upon the defendant were the ordinary ones existing in times of peace and governed wholly by local law. But the time was not ordinary: The event occurred at the time of the most critical period of the late war; the Congress had declared a state of war between the United States and Germany; the emergency was grave; and the obligation to do all things to assist in prosecuting the war which rested upon those who held the particular office of defendant, was high and imperative. The Congress had theretofore, in and by the enactment of the Selective Service Act (the Act of May 18, 1917, entitled "An Act to authorize the President to increase temporarily the military establishment of the United States"), declared that "in view of the existing emergency which demands the raising of troops in addition to those now available, the President be and he is hereby authorized" to raise, if he elects, by selective draft and to organize and equip in an army, the entire manhood of the country between the ages of twenty-one and thirty years; and further (Section 2). It was provided that this draft "shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of the Act."

The Act further authorized the President to create and establish throughout the several States, etc., "local boards," and prescribed that such boards should

> "have jurisdiction under the rules and regulations prescribed by the President."

And the Act further provides (Section 4):

> "The President shall make rules and regulations governing the organization and procedure of such local boards"; and
>
> "All other rules and regulations necessary to carry out the terms and provisions of this Section."

Such boards were created, and it is a matter of history that the practical administration of the Selective Service Act up to the time of the induction of registrants into the service, was carried on and conducted by these local boards with great success, they were the practical administrators of the Act. Under and in obedience to the provisions of the Act, the President established rules and regulations which were at times even supplemented by "directions, either from the Secretary of War or the Attorney General. The first regulations so prescribed were superseded, and the regulations effective at the time of the transaction in the case at bar, were promulgated on November 8, 1917, and published as "Form 999," and which have been, for the sake of brevity, cited as S, S, R.

These regulations, containing upwards of three hundred sections, regulated in more detail the procedure for registering, selecting and mustering into the military service the persons that were to be called. The initial proceeding was the filing by registrants of the well-known questionnaire. Upon such filing, certain persons were to be immediately inducted into the service, but certain others, among whom was the plaintiff, were to be given a so-called deferred classification in different ranks, to the end that if a further draft might be necessary, persons of the successive ranks might be called. In the meantime, the registrants given such deferred classification were still within the *scope* and *purview* of the *Selective Service Act* and in an important sense *under the jurisdiction* of the *local boards.* In that behalf, Rule 40 of the Selective Service Regulations provided as follows:

> "Section 40. Persons over whom Local Boards have jurisdiction.
>
> Each Local Board shall have jurisdiction in its area of jurisdiction in respect of persons who registered therein, or who shall register therein as herein provided, and in respect of any person whose registration card has been duly delivered to and remains in the possession of such Local Boards; and also of all questions to be heard and determined by such Local Board under the terms of the Selective Service Law and these Rules and Regulations, and shall have full authority to do and perform all other acts authorized to be performed by a Local

Board by the Selective Service Law or rules, regulations, or directions of the President."

The regulations made further provision and imposed upon the local boards further duties in respect of cases whose conduct or status might be such as to render them subject to restraint. It thus provided for two classes of persons who might be taken into custody:

(1.) Deserters. Persons summoned by the draft after their actual induction into the service were to be governed by military law and if they attempted to evade, were to be tried by court martial and punished in accordance with the articles of war. The local boards were concerned only in their preliminary detention, and such deserters were to be arrested without warrant.

(2.) Delinquents. Persons so designated were those persons within the purview of the Selective Service Act who had failed to file the questionnaire or had failed to respond to summons for examination or who had endeavored to evade the provisions of the Act in some manner and who had not been inducted into the military service. The local board had jurisdiction and duties to perform in respect to such delinquents and various of the regulations governed such duties, of which Section 135 may be cited:

"Section 135. Action by Local Board when delinquent not yet inducted into military service reports to it.

"When a delinquent reports or is transferred to or is brought by a police officer before a Local Board prior to his induction into military service the board shall, in all cases, require him to file a Questionnaire. The board shall consider the excuse for his delinquency, and if it sees fit may extend time and proceed to a reclassification in the normal manner. If the Board finds no reasonable excuse for the delinquency, it may consider the failure to claim deferred classification as a waiver of the right to do so before either Local or District Board, both in their original jurisdiction or on appeal, and may refuse to extend time or reclassify the registrant.

"If the delinquency was a failure to report for physical examination, the Local Board should in all cases proceed to physical examination.

"Whether the delinquent is reclassified or not, whenever the delinquency appears to have been willful, the board shall report the case to the nearest representative of the Federal Department of Justice.

"Where a delinquent has reported to the Local Board, pursuant to the orders of the Adjutant General of a State, the board shall, in all cases and on the same day, report the fact to the Adjutant General of the State (Form 1016), who shall at once, by an order in writing (Form 1017), rescind the order for the delinquent's induction into military service."

And Section 130 provides:

> "The names of persons who fail to return their Questionnaire or to report for physical examination when ordered to do so shall forthwith be sent to the local police authority (see sec. 1, par. (o), with a request (Form 1012) immediately to visit, in person or through deputies, all such named persons and to bring them before the Local Board. Such names, with a statement of the delinquency of each, should, at the time they are reported to the police, also be reported to the press with a request for publication.
>
> "If the local police authority brings such persons before the Local Board, they shall be treated as provided in Section 135 hereof.
>
> "If the local police authority is unable to produce such persons within five days, he shall immediately report to the Local Board all information he may have obtained concerning the delinquent registrants, or if he has no such information he shall report that fact."

By the express provisions of the regulations, the forms thereto attached constitute a portion thereof and are equally binding. And it will appear from the regulations that Form 1012, appearing at Page 159 of "Form 999," contemplates the following procedure:

The local board, or a member thereof, sends to a local police authority the names of the delinquents with the requirement that the police are required immediately to visit in person, or through deputies,

each person whose name appears on the list, to locate such persons, if possible, and bring them before the Board. In case of inability to produce such person, the fact shall be reported to the Board with all information obtained. If the Local Board finds it to be a case of delinquency, they may consider the excuse therefor and either extend the time or proceed to a reclassification, and if it finds no reasonable excuse, may consider the delinquency as a waiver of deferred classification, and if it deems the delinquency willful, the case may be reported to the nearest representative of the Federal Department of Justice. The police authority referred to is defined in Subdivision O of Section 1 of the Regulations, so as to include United States or State peace officers, including police "and all similar officers, by whatever name known, having authority to take persons into custody in order to preserve the peace and quiet of the community and to maintain public order and tranquility."

The duty of the said "police authority" is equally clear, for it is provided in Section 49 of the said Selective Service Regulations as follows:

> "Section 49. Duty of Police Officials of all Classes and Grades to assist Local Boards and to Apprehend Delinquents.
>
> "Those who fail to return the Questionnaire, or to appear for physical examination, or to report change of status, or to report for any duty, or to perform any act at the time and place required by these regulations or by direc-

tions by Local or District Boards in pursuance thereof, are guilty of a misdemeanor under Section 6 of the Selective Service Law. (See sec. 129.) Under authority granted in Section 6 of that law, it is hereby made the duty of all police officials (see sec. 1, par. (o), of the United States and of any State, or county, municipality, or other subdivision thereof, to locate and take into custody (see sec. 130), such persons and to bring them forthwith before Local Boards to determine whether their cases shall be reported to the Federal Department of Justice for prosecution, and to serve the summons to witnesses issued by Local or District Boards, as provided by section 9 hereof.

"Persons who, after induction into military service, with intent to evade such service, willfully fail to report to Local Boards for military duty, or fail to entrain for a mobilization camp, or who absent themselves from entrainment or from their parties of selected men en route to a mobilization camp, are deserters and are subject to military law. It is hereby made the duty of all such police officials to apprehend and arrest such deserters and proceed in respect of them as provided in sections 51, 130 and 140."

It thus appears that it is plainly the duty of the police to arrest in suspicious cases and to take the supposed delinquent initially before a Local Board to determine whether the case shall be reported to the Federal Department of Justice for prosecution; that is to say, it contemplates the taking into custody

and a preliminary investigation before a criminal prosecution shall be initiated by the Department of Justice. When such a person is brought before the Local Board and it determines that it is proper to then and there register him and require him to file a Questionnaire, it may do so; while if it appears to be grave enough for a prosecution, it orders accordingly. The procedure contemplated is in effect that provided by Section 135, S. S. R.

The delinquency mentioned in Section 135, while stated to be the failure to file a Questionnaire or to appear for physical examination or to submit to an induction into service, may be further back and may consist in the failure of the party to even register. This situation is taken care of by Section 54 of the said Regulations. It is there provided that:

> "Local Boards will accomplish the registration of persons subject to registration who, for any reason, have not been registered on or since June 5, 1917. Registration shall consist in making out a registration card in duplicate (Form 1) and issuing to the registrant a registration certificate (Form 2)."

Or the case may be governed by the amended regulation in that behalf issued September 16, 1918, two days before the matter here at issue, reading as follows:

> "(b) The following procedure shall be observed by Local Boards in accomplishing the registration of all persons subject thereto, who, for any reason, have not been registered on or

> before the date to be hereafter fixed by the Provost Marshal General after which registration cards are not to be assigned serial numbers in accordance with 'Registration Regulations No. 3.'
>
> "Registration shall consist in making out a registration card in duplicate (Form 1, red, sec. 275, p. 219) and issuing to the registrant a registration certificate (Form 68, sec. 276, p. 221.' "

Immediately upon the registration, the Local Board is to enter the name of the registrant at the bottom of the Classification List, and to furnish him a Questionnaire. Thereupon, the case is governed by Section 135, in that the Board shall require the party to file a Questionnaire and proceed accordingly, unless it appears that the delinquency is willful, in which case a prosecution is directed. And it clearly is to be inferred that up to that time it is not contemplated that a criminal complaint shall have been filed.

It is not needful to cite cases in support of the validity of the legislation embraced in the Selective Service Act or of the validity of the rules enacted thereunder. It is within the knowledge of the Court that attacks upon such legislation have been made and have uniformly proved unsuccessful. Note may be made to the case of

Arver v. United States, 245 U. S., 366; 62 Law ed. 349

And also in the case of

Pappens v. U. S., 252 Fed. 55.

The latter case was decided by this Court and expressly upheld the power of making rules and regulations under this Act. In truth, all of the law governing the situation at hand is contained within the Selective Service Act and the regulations and directions thereunder. Under Section 5 of the regulations it is provided:

> "Section 5. Forms are part of regulations. All forms the use of which is prescribed in these Rules and Regulations, and all forms which were prescribed by preexisting Rules and Regulations and were in use before and at the date of these Rules and Regulations, the continued use of which is either expressly or impliedly required by these Rules and Regulations, together with the particular rules, instructions, and directions contained in all such forms, are a part of these Rules and Regulations."

And in Section 6 of the regulations it is declared that "These Rules and Regulations have the force and effect of law." And Section 6 of the Act provides for the punishment of persons who are charged with the duty of carrying into effect any provisions of the act or regulations made or *directions given thereunder* and who shall fail or neglect to perform such duty. We have cited the significant portions of the Regulations from whence we have shown that it is clear that the acts of the defendant were in the proper performance of his duty.

The duty of Defendant Casserly under the "Selective Service Act" was plain and imperative and was not improperly performed.

Section 6 of the Selective Service Act is quite pertinent in laying down the duties of members of the Local Board; it provides as follows:

> Sec. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and *all persons designated* or *appointed under regulations prescribed by the President,* whether such appointments are made by the President himself or by the Governor or other officer of any State or Territory, to *perform any duty* in the *execution* of this *act* are hereby *required* to *perform* such duty as the President shall *order* or *direct*, and all such officers and agents and persons so designated or appointed shall hereby *have full authority* for *all acts done* by *them* in the *execution* of this act by the dierction of the President. Correspondence in the execution of this act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who *shall fail* or *neglect* to

> *perform such duty,* and any person charged with such duty or having or exercising any authority under said act, regulations, or directions who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty *of a misdemeanor,* and upon conviction by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

And Section 33 Selective Service Regulations, Form 999, after quoting the above-mentioned portions of Section 6 of the law, declares:

> "Under this authority members of Boards are as effectively drafted for this duty as are registrants who are selected for military service."

And members of these Boards are charged with important duties other than the mere registration or selection of persons drafted for the army. They have important duties in respect to delinquents, or

alleged delinquents, for by Section 49 of the Selective Service Regulations, above quoted, local police authority of either the United States or the State is commanded to locate and take into custody such persons and *bring them forthwith before Local Boards.* Thereupon it is the duty of the Local Board to determine, among other things, whether the delinquency is so willful as to justify prosecution for a crime or to justify report to the Federal Department of Justice for prosecution.

And Section 130 of the same regulations prescribes a complementary procedure to cover the case where the information of the delinquency first comes to the Local Board and they are to direct the police authority to apprehend the delinquent.

In either event, the procedure under Section 135 of the regulations then is carried out; that is to say, the delinquent is registered, if necessary, files the Questionnaire and is given or refused deferred classification and thereupon released, unless it appears to the Board that the delinquency is willful, in which event a prosecution is to be instituted and apparently for the first time a criminal complaint filed. In the same line reference may be made to the proclamation of the President of November 2, 1917, appearing as the "foreword" in the second edition of the Selective Service Regulations published as "Form 999 A," wherein, after praising the work of these Boards, the President declares:

> "I call upon all citizens therefore to assist Local and District Boards by proffering such service and such material conveniences as they can offer and by appearing before the Boards or upon summons or upon their own initiative to give such information as will be useful in classifying registrants."

And also:

> "It is important also that police officials of every grade and class should be informed of their duty under the Selective Service law and regulations to search for persons who do not respond promptly and to serve the summons of Local and District Boards."

Under Section 6 of the Selective Service law, above quoted, the President is authorized to use the service of all Departments, officers or agents of either the United States or the several states or their subdivisions in the execution of this Act and the penal provisions. The same section requires such officials, under penalty of being guilty of a misdemeanor, to carry into effect the provisions of the law or the regulations thereunder or the directions thereunder.

In addition to the agency of the Department of War in the administration of the Act under the immediate direction of the Provost Marshal General, a large duty was imposed on the Department of Justice, and accordingly the Bureau of Investigation of the Department of Justice performed an important duty in the detection and apprehending of persons evading the Selective Service Draft Act, so

that, as appears at page 14 of the Attorney's General's report for the year 1919, that Department during the year 1918-19 investigated 300,000 cases of alleged violations of Sections 5 and 6 of the Act, of which 95% were found to be delinquents, but it is further stated that it was estimated that only 50,000 of the latter cases will develop into willful delinquencies for which indictments will be returned. Therefore, the difference between the number investigated and the number prosecuted represents the large number which were taken in the first place before the Local Draft Boards, and, after investigation, properly inducted into the military service. The number of such inductions would form several army divisions, whence can be seen the importance of this particular provision of the law.

The Plaintiff Wheeler was not charged with crime nor apprehended as a criminal.

It will appear from the above-mentioned regulations, as well as from what the Attorney General reports as to the practical administration of the Act, that there was a large class of persons who had technically at least violated the provisions of the Selective Service Act in respect of their registration, etc., but whose delinquency was not willful. And it appears to have been the policy of the President and those charged by him with the administration of the law to make this large class of persons *soldiers* rather than *convicts*. Thereupon, when taken into custody, they were taken in the first instance before a Local

Draft Board, and unless the delinquency was flagrant and willful, no prosecution was had, but instead there was an induction into the military service. Accordingly we note that the summary procedure in that behalf before the Local Board was not a criminal investigation, there was no sworn complaint filed or warrant issued thereon. The notice sent out under Section 130, S. S. R., may usually have been in writing, but might have been merely verbal, for, by Section 49, S. S. R., the same officials were authorized to bring the delinquent in without any notice. In a word, the seizure of the alleged delinquents, while they may have been technically guilty of misdemeanor, was to be made, not under the Federal criminal jurisdiction, but under the War powers being executed by the President. Under the Selective Draft Act all the manhood of the country between certain ages were thereby made potential soldiers theoretically within the custody of the President, and until called and inducted into the service they were merely temporarily at large, subject to be brought in under such circumstances as the President might have deemed wise or proper. It is to be noted that it was only after a preliminary hearing before the Local Board that a criminal proceeding against the alleged delinquents was to be authorized. This is of persuasive force to show that no criminal complaint was to be filed previous to the first apprehension.

That the Plaintiff Wheeler was not in fact a delinquent is not controlling nor even significant.

In the practical construction of the Act it was to be expected that cases of suspected delinquents would be brought on where it subsequently developed that the party was innocent. This is no more than what happens in the case of the administration of any criminal law. It is sufficient that it is shown that the officials were proceeding within their jurisdiction in the administration of the Selective Service Act and were proceeding in entire good faith. But these facts were not even allowed to be considered by the jury, it being considered that the matter was to be wholly determinable under the law of the State of California affecting ordinary civilians in time of peace.

The defendant having received credible information from the Department provided by the Government to determine just that thing, took some steps to apprehend the suspect. It was his sworn duty, and also provided under the penalty of criminal prosecution, that he should prevent any suspect from evading the Act. He could have sent a written order to a policeman to bring Wheeler in. The policeman could have brought him in on his own volition. Whereupon in either event a preliminary hearing in advance of a criminal prosecution was properly to be had before the Draft Board. Essentially the transaction here was that very thing, Wheeler appearing, the defendant caused a policeman to take

him into custody to the end that further proceedings might be had. At the time, it being after office hours, it was not practicable to summon the Department of Justice operatives who presumably knew the facts; neither was the whole Board present for a hearing. Merely postponing the matter until the following day is not to be condemned. Normally, on the following day, Wheeler would have been brought before the Draft Board either to submit to the Selective Service Act or to have a criminal prosecution against him directed. In the interim the Department of Justice agents, learning their mistake, released him. Literally he did thereafter come before the Draft Board, although not under restraint, for he appeared later and obtained the permit which he had previously sought, the issuance of which would be the Board's ruling that he was not a delinquent.

Nor does the fact that it turned out that plaintiff was registered not with the San Francisco Local Board but with that of Seattle, alter the case. It will be urged that the San Francisco Board was not concerned in Wheeler's status and therefore could not take his case into consideration. But this is begging the question; for if the party taken into custody was, as suspected, some one other than Rey B. Wheeler, if he was in fact one Billy Nolan, a fugitive and guilty either of failing to register or file a Questionnaire or of any other breach of the Act, it was proper for any police authority to apprehend him. And having done so, he was properly brought by

them before the Local Board of the jurisdiction in the District in which he was found.

The Court erred in excluding evidence of the course of Procedure of Department operatives.

The facts of this exception are indicated at page 66 of the transcript. The defendant claims the question should have been allowed as tending to show that the Department of Justice operatives proceeded according to their customary procedure as prescribed in such cases. The exception is in addition to exceptions to the instructions, and is a matter of minor importance, although we believe erroneous. We believe the true view to be that the Court will take notice of all of these matters as being well known matters of Government procedure. But in the event such view be not well founded, we submit that the Court should have received the testimony.

CONCLUSION

We earnestly urge that an injustice has been done to this defendant in the result of the case in the District Court. With true patriotism, he had for many months assiduously devoted all his time and service to the administration of the Selective Service Act, and, as the President pointed out in the proclamation above referred to, the services of such Boards were of great value. He served without recompense other than the knowledge of having well performed a necessary public duty in time of great crisis. In the varied administration of his office on September

18, 1918, the particular transaction came up. He received his information from the Bureau of the Government provided for just that purpose. He had no reason to discount it. Whereupon it became his duty to prevent what seemed to be an evasion of the law. The method adopted by him was not contrary to the law and regulations under which he was serving. He was wholly in good faith. Not a scintilla of testimony tends to show any malice. More than that, it was a matter within his jurisdiction whence he would not be liable to be mulcted for a mere error in judgment. His actions also must be tested by the times. It was the very high tide of the prosecution of the late war. At the very time of the incident the army was moving into position to begin the great battle of the Argonne and imperative orders had gone from the Commander in Chief to exert the utmost power and effort of the nation to reach a victorious conclusion. All parties concerned, plaintiff, defendant, policemen and operatives were within the sweep of the President's comprehensive war jurisdiction in securing the muster into the military service of all persons liable. The defendant did not doubt then or for many months thereafter that his administration was entirely just and legal. Seven days less than one year after the incident, he was suddenly, "like a bolt from the blue," called into the Superior Court of the State of California to defend an action seeking damages in the sum $10,000 for an act manifestly within his jurisdiction and properly performed. The result of the trial of the District

Court was to mulct him in damages therefor. We submit that this Court will here arrest the operation of the judgment of the District Court as manifestly illegal and unjust.

Respectfully submitted,

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